FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,

Plaintiffs-Appellees,

and

KAREN SWEIGERT, M.D.,

Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; TIMOTHY PAUL DRESTE; MICHAEL B. DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; STEPHEN P. MEARS; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; CHARLES WYSONG,

Defendants,

and

No. 99-35320

D.C. No.
CV-95-01671-REJ
(District of Oregon)

MONICA MIGLIORINO MILLER;
DONALD TRESHMAN,
Defendants-Appellants.

PLANNED PARENTHOOD OF
THE COLUMBIA/WILLAMETTE, INC.;
PORTLAND FEMINIST WOMEN'S
HEALTH CENTER; ROBERT CRIST,
M.D.; WARREN M. HERN, M.D.;
ELIZABETH NEWHALL, M.D.; JAMES
NEWHALL, M.D.,
Plaintiffs-Appellees,

and

KAREN SWEIGERT, M.D.,
Plaintiff,

v.

AMERICAN COALITION OF LIFE
ACTIVISTS; ADVOCATES FOR LIFE
MINISTRIES; MICHAEL BRAY;
ANDREW BURNETT; DAVID A.
CRANE; TIMOTHY PAUL DRESTE;
JOSEPH L. FOREMAN; STEPHEN P.
MEARS; MONICA MIGLIORINO
MILLER; CATHERINE RAMEY; DAWN
MARIE STOVER; DONALD TRESHMAN;
CHARLES WYSONG,
Defendants,

and

MICHAEL DODDS; CHARLES ROY
MCMILLAN; BRUCE EVAN MURCH,
Defendants-Appellants.

No. 99-35325

D.C. No.
CV-95-01671-REJ
(District of Oregon)

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,
Plaintiffs-Appellees,

and

KAREN SWEIGERT, M.D.,
Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; MICHAEL DODDS; CHARLES ROY MCMILLAN; STEPHEN P. MEARS; MONICA MIGLIORINO MILLER; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN,
Defendants,

and

TIMOTHY PAUL DRESTE; JOSEPH L. FOREMAN; CHARLES WYSONG,
Defendants-Appellants.

No. 99-35327

D.C. No.
CV-95-01671-REJ
(District of Oregon)

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,

Plaintiffs-Appellees,

and

KAREN SWEIGERT, M.D.,

Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; CATHERINE RAMEY; DAWN MARIE STOVER,

Defendants-Appellants,

and

TIMOTHY PAUL DRESTE; MICHAEL DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; STEPHEN P. MEARS; MONICA MIGLIORINO MILLER; BRUCE EVAN MURCH; DONALD TRESHMAN; CHARLES WYSONG,

Defendants.

No. 99-35331

D.C. No. CV-95-01671-REJ (District of Oregon)

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,

Plaintiffs-Appellees,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID A. CRANE; TIMOTHY PAUL DRESTE; MICHAEL B. DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN; CHARLES WYSONG,

Defendants.

PAUL DEPARRIE,

Movant-Appellant.

No. 99-35333

D.C. No. CV-95-01671-REJ (District of Oregon)

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.; KAREN SWEIGERT, M.D., individually and on behalf of all persons similarly situated,
Plaintiffs-Appellees,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL BRAY; ANDREW BURNETT; DAVID CRANE; TIMOTHY PAUL DRESTE; MICHAEL DODDS; JOSEPH L. FOREMAN; CHARLES ROY MCMILLAN; MONICA MIGLIORINO MILLER; BRUCE EVAN MURCH; CATHERINE RAMEY; DAWN MARIE STOVER; DONALD TRESHMAN; CHARLES WYSONG,
Defendants-Appellants.

No. 99-35405

D.C. No. CV-95-01671-REJ (District of Oregon)

ORDER

Filed July 10, 2002

Before: Mary M. Schroeder, Chief Judge, and Stephen Reinhardt, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela Ann Rymer, Andrew J. Kleinfeld, Michael Daly Hawkins, Barry G. Silverman, Kim McLane Wardlaw, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges.

ORDER

Judge Kozinski's dissent from the opinion filed May 16, 2002, is amended as follows:

1. Kozinski Dissent at 7147. After:

> But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. *Planned Parenthood of the Columbia/Willamette, Inc.* v. *Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1134-35 (D. Or. 1999).

Add:

> In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. R.T. at 131, 1197.

2. Kozinski Dissent at 7147. At the end of the sentence:

> The record reveals one instance where an individual—Paul Hill, who is not a defendant in this case—participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him.

Append:

> some seven months later.

3. Kozinski Dissent at 7147-48. After:

> All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence.

Add:

> And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. *See* R.T. at 1775-76, 1783-84, 2487, 2828.

4. Kozinski Dissent at 7151. After:

> The activities for which the district court held defendants liable were unquestionably of a political nature.

Add:

> There is no allegation that any of the posters in this case disclosed private information improperly obtained. We must therefore assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals.

5. Kozinski Dissent at 7156. Delete footnote 7 and renumber subsequent footnotes accordingly.

A majority of the en banc panel has voted to deny the appellants' joint petition for rehearing en banc before the full court. Judges Kozinski and O'Scannlain voted to grant.

The full court has been advised of the petition for rehearing en banc before the full court, and no judge of the court has requested a vote before the full court on the appellants' joint petition for rehearing en banc before the full court. Fed. R. App. P. 35(b).

The joint petition for rehearing en banc before the full court is DENIED.

KOZINSKI, Circuit Judge, with whom Circuit Judges REINHARDT, O'SCANNLAIN, KLEINFELD and BERZON join, dissenting:

The majority writes a lengthy opinion in a vain effort to justify a crushing monetary judgment and a strict injunction against speech protected by the First Amendment. The apparent thoroughness of the opinion, addressing a variety of issues that are not in serious dispute,[1] masks the fact that the majority utterly fails to apply its own definition of a threat, and affirms the verdict and injunction when the evidence in the record does not support a finding that defendants threatened plaintiffs.

After meticulously canvassing the caselaw, the majority correctly distills the following definition of a true threat: "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as *a serious expression of intent to inflict bodily harm* upon

[1]For example, it is clear that context may be taken into account in determining whether something is a true threat, an issue to which the majority devotes 16 pages. *See* Maj. op. at 7105-14, 7119-22. Nor is there a dispute that someone may be punished for uttering threats, even though he has no intent to carry them out, *see id.* at 7114-15, or that we defer to the fact-finder on questions of historical fact in First Amendment cases, *id.* at 7099-7100.

that person." Maj. op. at 7116-17 (emphasis added).[2] The emphasized language is crucial, because it is not illegal—and cannot be made so—merely to say things that would frighten or intimidate the listener. For example, when a doctor says, "You have cancer and will die within six months," it is not a threat, even though you almost certainly will be frightened. Similarly, "Get out of the way of that bus" is not a threat, even though it is said in order to scare you into changing your behavior. By contrast, "If you don't stop performing abortions, I'll kill you" is a true threat and surely illegal.

The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. Thus, when a doctor tells a patient, "Stop smoking or you'll die of lung cancer," that is not a threat because the doctor obviously can't cause the harm to come about. Similarly, "If you walk in that neighborhood late at night, you're going to get mugged" is not a threat, unless it is clear that the speaker himself (or one of his associates) will be doing the mugging.

In this case, none of the statements on which liability was premised were overtly threatening. On the contrary, the two posters and the web page, by their explicit terms, foreswore

[2]Although the majority's definition does not specify *who* is to inflict the threatened harm, use of the active verb "inflict" rather than a passive phrase, such as "will be harmed," strongly suggests that the speaker must indicate he will take an active role in the inflicting. Recent academic commentary supports the view that this requirement is an integral component of a "true threat" analysis. *See* Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 Tex. L. Rev. 541, 590 (2000) (part of what "separates constitutionally unprotected true threats from constitutionally protected *Claiborne Hardware*-style political intimidation is [that] the speaker communicates the intent to carry out the threat personally or to cause it to be carried out"); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 289 (2001) ("determining what is a true threat [should] require[ ] proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat").

the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so. Nevertheless, because context matters, the statements could reasonably be interpreted as an effort to intimidate plaintiffs into ceasing their abortion-related activities. If that were enough to strip the speech of First Amendment protection, there would be nothing left to decide. But the Supreme Court has told us that "[s]peech does not lose its protected character . . . simply because it may embarrass others *or coerce them into action*." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (emphasis added). In other words, some forms of intimidation enjoy constitutional protection.

Only a year after *Claiborne Hardware*, we incorporated this principle into our circuit's true threat jurisprudence. Striking down as overbroad a Montana statute that made it a crime to communicate to another "a threat to . . . commit a criminal offense," we stated: "The mere fact that communication induces or 'coerces' action in others does not remove it from first amendment protection." *Wurtz* v. *Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983) (quoting *Claiborne Hardware*, 458 U.S. at 911). We noted—referring to *Claiborne Hardware* again—that the statute criminalized pure speech designed to alter someone else's conduct, so that a "civil rights activist who states to a restaurant owner, 'if you don't desegregate this restaurant I am going to organize a boycott' could be punished for the mere statement, even if no action followed." *Id.* at 1442. *Claiborne Hardware* and *Wurtz* hold that statements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded.

The majority recognizes that this is the standard it must apply, yet when it undertakes the critical task of canvassing the record for evidence that defendants made a true threat—a task the majority acknowledges we must perform de novo,

Maj. op at 7105—its opinion fails to come up with any proof that defendants communicated an intent to inflict bodily harm upon plaintiffs.

Buried deep within the long opinion is a single paragraph that cites evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat. Maj. op at 7121-22; *see also id.* at 7137-38 (same analysis). The majority does not point to any statement by defendants that they intended to inflict bodily harm on plaintiffs, nor is there any evidence that defendants took any steps whatsoever to plan or carry out physical violence against anyone. Rather, the majority relies on the fact that "the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 7121; *see also id.* at 7137-38. But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. *Planned Parenthood of the Columbia/Willamette, Inc.* v. *Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1134-35 (D. Or. 1999). In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. R.T. at 131, 1197.

The record reveals one instance where an individual—Paul Hill, who is not a defendant in this case—participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him some seven months later. All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence. And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. *See* R.T. at 1775-76, 1783-84, 2487, 2828. There is therefore no pattern showing that people who prepare wanted-type posters then engage in physi-

cal violence. To the extent the posters indicate a pattern, it is that almost all people engaged in poster-making were nonviolent.[3]

The majority tries to fill this gaping hole in the record by noting that defendants "kn[ew] the fear generated among those in the reproductive health services community who were singled out for identification on a 'wanted'-type poster." Maj. op at 7121. But a statement does not become a true threat because it instills fear in the listener; as noted above, many statements generate fear in the listener, yet are not true threats and therefore may not be punished or enjoined consistent with the First Amendment. *See* pp. 7144-46 *supra*. In order for the statement to be a threat, it must send the message that the speakers themselves—or individuals acting in concert with them—will engage in physical violence. The majority's own definition of true threat makes this clear. Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm.

Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being identified as a target. And . . . all the John Salvis

[3]The majority so much as admits that the Nuremberg Files website does not constitute a threat because of the large number of people listed there. Maj. op. at 7122. The majority does point out that doctors were listed separately, and that the names of doctors who were killed or wounded were stricken or greyed out, *id.* at 7122, but does not explain how this supports the inference that the posting of the website in any way indicated that *defendants* intended to inflict bodily harm on plaintiffs. At most, the greying out and strikeouts could be seen as public approval of those actions, and approval of past violence by others cannot be made illegal consistent with the First Amendment. *See Hess* v. *Indiana*, 414 U.S. 105, 108-09 (1973); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969); *Edwards* v. *South Carolina*, 372 U.S. 229, 237-38 (1963); *Noto* v. *United States*, 367 U.S. 290, 297-99 (1961).

in the world know who I am, and that's my concern."[4] *Planned Parenthood of the Columbia/Willamette, Inc.* v. *Am. Coalition of Life Activists*, No. CV-95-01671-JO, at 302 (D. Or. Jan. 8, 1999); *see also id.* at 290 ("[U]p until January of '95, I felt relatively diluted by the—you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were—you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hern, another plaintiff, testified that when he heard he was on the list, "I was terrified. [I]t's hard to describe the feeling that—that you are on a list of people to—who have been brought to public attention in this way. I felt that this was a—a list of doctors to be killed." *Planned Parenthood*, No. CV-95-01671-JO, at 625 (Jan. 11, 1999).

From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the posters or from unrelated third parties; bullets kill their victims regardless of who pulls the trigger. But it makes a difference for the purpose of the First Amendment. Speech—especially political speech, as this clearly was—may not be punished or enjoined unless it falls into one of the narrow categories of unprotected speech recognized by the Supreme Court: true threat, *Watts* v. *United States*, 394 U.S. 705, 707 (1969), incitement, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), conspiracy to commit criminal acts, *Scales* v. *United States*, 367 U.S. 203, 229 (1961), fighting words, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-73 (1942), etc.

[4]In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. *See Planned Parenthood*, 41 F. Supp. 2d at 1135-36. Salvi is not a defendant in this case and, as far as the record reveals, was not engaged in the preparation of any posters.

Even assuming that one could somehow distill a true threat from the posters themselves, the majority opinion is still fatally defective because it contradicts the central holding of *Claiborne Hardware*: Where the speaker is engaged in public political speech, the public statements themselves cannot be the sole proof that they were true threats, unless the speech directly threatens actual injury to identifiable individuals. Absent such an unmistakable, specific threat, there must be evidence *aside from the political statements themselves* showing that the public speaker would himself or in conspiracy with others inflict unlawful harm. 458 U.S. at 932-34. The majority cites not a scintilla of evidence—other than the posters themselves—that plaintiffs or someone associated with them would carry out the threatened harm.

Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment: "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927 (citing *Brandenburg*, 395 U.S. at 447) (emphasis in the original).[5] *Claiborne Hardware* in fact goes much farther; it cautions that where liability is premised on "politically motivated" activities, we must "examine critically the basis on which liability was imposed." *Id.* at 915. As the Court explained, "Since respondents would impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment—we approach this suggested basis for liability with extreme care." *Id.* at 926-27. This is precisely what the majority does *not* do; were it to do so, it would have no choice but to reverse.

[5]Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an immediacy of action that simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory.

The activities for which the district court held defendants liable were unquestionably of a political nature. There is no allegation that any of the posters in this case disclosed private information improperly obtained. We must therefore assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals. The "Deadly Dozen" posters and the "Nuremberg Files" dossiers were unveiled at political rallies staged for the purpose of protesting *Roe* v. *Wade*, 410 U.S. 113 (1973). Similarly, defendants presented the poster of Dr. Crist at a rally held on the steps of the St. Louis federal courthouse, where the *Dred Scott* decision was handed down, in order to draw a parallel between "blacks being declared property and unborn children being denied their right to live." *Planned Parenthood*, CV-95-01671-JO, at 2677 (Jan. 22, 1999). The Nuremberg Files website is clearly an expression of a political point of view. The posters and the website are designed both to rally political support for the views espoused by defendants, and to intimidate plaintiffs and others like them into desisting abortion-related activities. This political agenda may not be to the liking of many people—political dissidents are often unpopular—but the speech, including the intimidating message, does not constitute a direct threat because there is no evidence other than the speech itself that the speakers intend to resort to physical violence if their threat is not heeded.

In determining whether the record here supports a finding of true threats, not only the reasoning but also the facts of *Claiborne Hardware* are highly relevant. *Claiborne Hardware* arose out of a seven-year effort (1966 to 1972) to obtain racial justice in Claiborne County, Mississippi. *Claiborne Hardware*, 458 U.S. at 898. The campaign employed a variety of tactics, one among them being the boycotting of white merchants. *Id.* at 900. The boycott and other concerted activities were organized by the NAACP, in the person of its Missis-

sippi field secretary Charles Evers, as well as by other black organizations and leaders. *Id.* at 898-900.

In order to persuade or coerce recalcitrant blacks to join the boycott, the organizers resorted to a variety of enforcement mechanisms. These included the posting of store watchers outside the boycotted stores. These watchers, also known as "Black Hats" or "Deacons," would "identif[y] those who traded with the merchants." *Id.* at 903.[6] The names were collected and "read aloud at meetings at the First Baptist Church and published in a local black newspaper." *Id.* at 909. Evers made several speeches containing threats—including those of physical violence—against the boycott violators. *Id.* at 900 n.28, 902, 926-27. In addition, a number of violent acts—including shots fired at individuals' homes—were committed against the boycott breakers. *Id.* at 904-06.

The lawsuit that culminated in the *Claiborne Hardware* opinion was brought against scores of individuals and several organizations, including the NAACP. The state trial court found defendants liable in damages and entered "a broad permanent injunction," which prohibited the defendants from engaging in virtually all activities associated with the boycott, including picketing and using store watchers. *Id.* at 893. The Mississippi Supreme Court affirmed, finding liability based on a variety of state law theories, some of which had as their gravamen the use of force or threat of force by those engaged in the boycott. *Id.* at 894-95.

The United States Supreme Court began its opinion in *Claiborne Hardware* by noting that "[t]he term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies" and that "certain joint activities have a 'chameleon-like' character." *Id.* at 888. The Claiborne County boycott, the Court noted, "had such a character; it included

[6]It would appear that in the small Mississippi community in Claiborne County, black residents knew each other on sight.

elements of criminality and elements of majesty." *Id.* The Court concluded that the state courts had erred in ascribing to all boycott organizers illegal acts—including violence and threats of violence—of some of the activists. The fact that certain activists engaged in such unlawful conduct, the Court held, could not be attributed to the other boycott organizers, unless it could be shown that the latter had personally committed or authorized the unlawful acts. *Id.* at 932-34.

In the portion of *Claiborne Hardware* that is most relevant to our case, *id.* at 927-32, the Court dealt with the liability of the NAACP as a result of certain speeches made by Charles Evers. In these speeches, Evers seemed to threaten physical violence against blacks who refused to abide by the boycott, saying that:

- the boycott organizers knew the identity of those members of the black community who violated the boycott, *id.* at 900 n.28;

- discipline would be taken against the violators, *id.* at 902, 927;

- "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck," *id.* at 902;

- "the Sheriff could not sleep with boycott violators at night" in order to protect them, *id.*;

- "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n.28 (emphasis in the original).

These statements, the Supreme Court recognized, "might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence whether or not improper discipline was specifically intended*."

Id. at 927 (emphasis added). Noting that such statements might not be constitutionally protected, the Court proceeded to consider various exceptions to the rule that speech may not be prohibited or punished.

The Court concluded that the statements in question were not "fighting words" under the rule of *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-73 (1942); nor were they likely to cause an immediate panic, under the rule of *Schenck* v. *United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."). *Id.* at 927. Nor was the speech in question an incitement under *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), because it resulted in no immediate harm to anyone. *Id.* at 927-28. The Court also cited, and found inapplicable, its one case that had held "true threats" were not constitutionally protected, *Watts* v. *United States*, 394 U.S. 705, 705 (1969). *Id.* at 928 n.71. The mere fact that the statements could be understood "as intending to create a fear of violence," *id.* at 927, was insufficient to make them "true threats" under *Watts*.

The Court then considered the theory that the speeches themselves—which suggested violence against boycott violators—might constitute authorization or encouragement of unlawful activity, but flatly rejected it. *Id.* at 929. The Court noted that the statements were part of the "emotionally charged rhetoric of Charles Evers' speeches," and therefore could not be viewed as authorizing lawless action, even if they literally did so: "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Id.* at 928. Absent "evidence—apart from the speeches themselves—that Evers authorized . . . violence" against the boycott breakers, neither he nor the NAACP could be held liable for, or enjoined from,

speaking. *Id.* at 929. In other words, even when public speech sounds menacing, even when it *expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals.

While set in a different time and place, and involving a very different political cause, *Claiborne Hardware* bears remarkable similarities to our case:

- Like *Claiborne Hardware*, this case involves a concerted effort by a variety of groups and individuals in pursuit of a common political cause. Some of the activities were lawful, others were not. In both cases, there was evidence that the various players communicated with each other and, at times, engaged in concerted action. The Supreme Court, however, held that mere association with groups or individuals who pursue unlawful conduct is an insufficient basis for the imposition of liability, unless it is shown that the defendants actually participated in or authorized the illegal conduct.

- Both here and in *Claiborne Hardware*, there were instances of actual violence that followed heated rhetoric. The Court made clear, however, that unless the violence follows *promptly* after the speeches, thus meeting the stringent *Brandenburg* standard for incitement, no liability could be imposed on account of the speech.

- The statements on which liability was premised in both cases were made during the course of political rallies and had a coercive effect on the intended targets. Yet the Supreme Court held in *Claiborne Hardware* that coercion alone could not serve as the basis for liability, because it had

not been shown—by evidence aside from the political speeches themselves—that defendants or their agents were involved in or authorized actual violence.

- In *Claiborne Hardware*, the boycott organizers gathered facts—the identity of those who violated the boycott—and publicized them to the community by way of speeches and a newspaper. As in our case, this ostentatious gathering of information, and publication thereof, were intended to put pressure on those whose names were publicized, and perhaps put them in fear that they will become objects of violence by members of the community. Yet the Supreme Court held that this could not form the basis for liability.

To the extent *Claiborne Hardware* differs from our case, the difference makes ours a far weaker case for the imposition of liability. To begin with, Charles Evers's speeches in *Claiborne Hardware* explicitly threatened physical violence. Referring to the boycott violators, Evers repeatedly went so far as to say that "we," presumably including himself, would "break your damn neck." 458 U.S. at 902. In our case, the defendants never called for violence at all, and certainly said nothing suggesting that they personally would be involved in any violence against the plaintiffs.

Another difference between the two cases is that the record in *Claiborne Hardware* showed a concerted action between the boycott organizers, all of whom operated within close physical proximity in a small Mississippi county. By contrast, there is virtually no evidence that defendants had engaged in any concerted action with any of the other individuals who prepared "wanted" posters in the past.[7]

[7]The closest connection the district court could find between defendants and any of these individuals was a visit paid by two defendants, Andrew

The most striking difference between the two cases is that one of Evers's speeches in *Claiborne Hardware*, which expressly threatened violence against the boycott violators, was in fact followed by violence; he then made additional speeches, again referring to violence against boycott breakers. 458 U.S. at 900 (April 1966 speech), 902 (April 1969 speeches).[8] By contrast, the record here contains *no* evidence that violence was committed against any doctor after his name appeared on defendants' posters or web page.[9]

The opinion's effort to distinguish *Claiborne Hardware*

Burnett and Catherine Ramey, to John Burt, a maker of such posters. At that meeting, they "discussed 'wanted' posters." *Planned Parenthood*, 41 F. Supp. 2d at 1135. The district court did not find that defendants participated in the preparation of Burt's posters, nor that they otherwise engaged in concerted activities with other abortion protesters.

[8]On April 1, 1966, Evers made a speech "directed to all 8,000-plus black residents of Claiborne County," where he said that "blacks who traded with white merchants would be *answerable to him*" and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Claiborne Hardware*, 458 U.S. at 900 n.28 (emphasis in the original). Later that year, violence was, indeed, committed against blacks who refused to join the boycott. *Id.* at 928. In April 1969, Evers reiterated his message in two other speeches, saying that "boycott violators would be 'disciplined' by their own people" and that " 'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.' " *Id.* at 902.

[9]The majority mentions that "[o]ne of the . . . doctors on the Deadly Dozen poster had in fact been shot before the poster was published." Maj. op. at 7138. The physician in question, Dr. Tiller, was shot and wounded in August 1993, a year and a half before the Deadly Dozen poster was unveiled. *Planned Parenthood*, 41 F. Supp. 2d at 1131-32, 1135. The majority does not explain how including Dr. Tiller's name on the Deadly Dozen poster contributed to the poster's threatening message. To the extent it is relevant at all, inclusion of Dr. Tiller's name cuts the other way because it goes counter to the supposed pattern that the majority is at such pains to establish, namely that listing of a name on a poster was followed by violence against that person. As to Dr. Tiller, that order is obviously reversed.

does not bear scrutiny. The majority claims that in *Claiborne Hardware*, "there was no context to give the speeches (including the expression 'break your neck') the implication of . . . directly threatening unlawful conduct." Maj. op. at 7111. As explained above, the majority is quite wrong on this point, *see* pp. 7093 *supra*, but it doesn't matter anyway: Evers's statements were threatening on their face. Not only did he speak of breaking necks and inflicting "discipline," he used the first person plural "we" to indicate that he himself and those associated with him would be doing the neck-breaking, 458 U.S. at 902, and he said that "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n.28 (emphasis in the original).

It is possible—as the majority suggests—that Evers's statements were "hyperbolic vernacular," Maj. op. at 7111,[10] but the trier of fact in that case found otherwise. The Supreme Court nevertheless held that the statements ought to be treated as hyperbole because of their political content. By any measure, the statements in our case are far less threatening on their face, yet the majority chooses to defer to the jury's determination that they were true threats.

The majority also relies on the fact that the posters here "were publicly distributed, but personally targeted." Maj. op. at 7138. But the threats in *Claiborne Hardware* were also individually targeted. Store watchers carefully noted the

[10]In support of this claim, the majority states that there was no "indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." Maj. op. at 7111. The majority extrapolates this conclusion from only four out of ten incidents of boycott-related violence cited in *Claiborne Hardware*. *See* 458 U.S. at 904-06. Although these were the four incidents about which the most information was available—perhaps because these four particular victims were not afraid to lodge a complaint or to come forward and testify—they alone are hardly sufficient to support a conclusion that Evers's audience largely ignored his warnings.

names of blacks who entered the boycotted stores, and those names were published in a newspaper and read out loud at the First Baptist Church, where Evers delivered his speeches. 458 U.S. at 903-04. When speaking of broken necks and other discipline, Evers was quite obviously referring to those individuals who had been identified as defying the boycott; in fact, he stated explicitly that he knew their identity and that they would be answerable to him. *Id.* at 900 n.28. The majority's opinion simply cannot be squared with *Claiborne Hardware*.

Claiborne Hardware ultimately stands for the proposition that those who would punish or deter protected speech must make a very substantial showing that the speech stands outside the umbrella of the First Amendment. This message was reinforced recently by the Supreme Court in *Ashcroft* v. *Free Speech Coalition*, No. 00-795, 2002 WL 552476 (U.S. Apr. 16, 2002), where the government sought to prohibit simulated child pornography without satisfying the stringent requirements of *Miller* v. *California*, 413 U.S. 15 (1973). The Court rejected this effort, even though the government had earnestly argued that suppression of the speech would advance vital legitimate governmental interests, such as avoiding the exploitation of real children and punishing producers of real child pornography. *See id.* at *11-*13; *see also id.* at *16 (Thomas, J., concurring in the judgment); *id.* at *17-*18 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at *21 (Rehnquist, C.J., dissenting). The Court held that the connection between the protected speech and the harms in question is simply too "contingent and indirect" to warrant suppression. *Id.* at *10; *see also id.* at *12 ("The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."). As Judge Berzon notes in her inspired dissent, defendants' speech, on its face, is political speech on an issue that is at the cutting edge of moral and political debate in our society, *see* Berzon Dissent at 7167, and political speech lies far closer to the core of the First Amendment than does simulated child pornography. "The

right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition*, 2002 WL 552476, at *12. If political speech is to be deterred or punished, the rationale of *Free Speech Coalition* requires a far more robust and direct connection to unlawful conduct than these plaintiffs have offered or the majority has managed to demonstrate. The evidence that, despite their explicitly non-threatening language, the Deadly Dozen poster and the Nuremberg Files website were true threats is too "contingent and indirect" to satisfy the standard of *Free Speech Coalition*.

The cases on which the majority relies do not support its conclusion. *United States* v. *Hart*, 212 F.3d 1067 (8th Cir. 2000), is a case where the communication did not merely threaten harm in the future, but was itself perceived as dangerous. The defendant there parked two Ryder trucks in the driveway of an abortion clinic, as close to the building as possible. *Hart*, 212 F.3d at 1069, 1072. Given the association of Ryder trucks with the Oklahoma City bombing, and the timing and location of the incident, the trucks could reasonably be suspected of containing explosives. They were much like mailing a parcel containing a ticking clock or an envelope leaking white powder. The threat in *Hart* came not from the message itself, but from the potentially dangerous medium used to deliver it.

To make *Hart* even remotely analogous to our case, the defendant there would have had to be picketing abortion clinics with a placard depicting a Ryder truck. We know that the Eighth Circuit would not have permitted the imposition of liability in that situation because of the careful manner in which it circumscribed its holding. The court noted that the trucks were parked in a driveway of the abortion clinic, near the entrance, rather than on the street, and that the incident was timed to coincide with a visit by the President to the area, which heightened security concerns. *Id.* at 1072. In light of these facts, a reasonable person could believe that the trucks

might be filled with explosives, which would not have been the case, had defendant merely carried a placard with a picture of a Ryder truck. In our case, the defendants merely displayed posters at locations nowhere near the plaintiffs' homes or workplaces. The threat, if any there was, came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs. *Hart* has no relevance whatsoever to our case.

Nor does *United States* v. *Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), a case involving repeated face-to-face confrontations between the defendant and the targets of her harangues, help the majority. Dinwiddie, a pro-life activist, stood outside Dr. Crist's abortion clinic and shouted various threats through a bullhorn, making it clear that she herself intended to carry them out. As Dinwiddie told one of Dr. Crist's co-workers: "[Y]ou have not seen violence yet until you see what *we* do to you." *Id.* at 925 (emphasis added). Where the speaker directly confronts her target and expressly states that she is among those who will carry out the violence, it is hardly surprising when the court finds that there has been a true threat.[11]

[11]Even then, *Dinwiddie* is instructive for the restraint it exercised in granting relief. Dinwiddie was not subjected to a crushing and punitive award of damages, and the injunction against her was narrowly drawn and carefully tailored to accommodate her legitimate interests, including her interest in free expression. She was not banned from all speech of a certain kind, but only from speech that expressly violates the Freedom of Access to Clinic Entrances Act or is delivered through a bullhorn within 500 feet of an abortion clinic. *Dinwiddie*, 76 F.3d at 928-29. The Eighth Circuit emphasized that "[t]he types of activity that the injunction would proscribe are quite narrow," and that Dinwiddie would be free to "carry signs, distribute literature, and speak at a reasonable volume even when she is within 500 feet of an abortion clinic." *Id.* By contrast, the injunction in our case indefinitely bars defendants from publishing, reproducing, distributing (and even owning) the posters, the website or anything similar, anywhere in the United States. *Planned Parenthood*, 41 F. Supp. 2d at 1155-56.

We have recognized that statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest. Our caselaw also instructs that, in deciding whether the coercive speech is protected, it makes a big difference whether it is contained in a private communication—a face-to-face confrontation, a telephone call, a dead fish wrapped in newspaper[12]—or is made during the course of public discourse. The reason for this distinction is obvious: Private speech is aimed only at its target. Public speech, by contrast, seeks to move public opinion and to encourage those of like mind. Coercive speech that is part of public discourse enjoys far greater protection than identical speech made in a purely private context. We stated this clearly in *McCalden* v. *Cal. Library Ass'n*, 955 F.2d 1214 (9th Cir. 1990), where, relying on *Brandenburg*, *Claiborne Hardware* and *Wurtz*, we allowed "public speeches advocating violence" substantially more leeway under the First Amendment than "privately communicated threats." *McCalden*, 955 F.2d at 1222.[13]

We reaffirmed the importance of the public-private distinction in *Melugin* v. *Hames*, 38 F.3d 1478 (9th Cir. 1994). Finding a death threat communicated to a magistrate judge by mail to be a "true threat," we expressly distinguished between "[t]he 'threat' in *Watts* against President Johnson [which] was made during a *public* political rally opposing the Vietnam War" and defendant's threats, which "were directed in a *private* communication to a state judicial officer with the intent

[12]*See The Godfather* (Paramount Pictures 1972).

[13]In my dissent from the failure to take *McCalden* en banc, I argued that this distinction was inapposite in *McCalden* because the statement involved—a warning by Holocaust survivors that they will disrupt an exhibit by a Holocaust revisionist with a demonstration—could not be characterized as a threat, even if communicated in private. *McCalden*, 955 F.2d at 1229 (Kozinski, J., dissenting from denial of rehearing en banc). I did not, of course, disagree with *McCalden*'s holding that public statements are entitled to more protection than private ones.

to obtain an immediate jury trial." *Id.* at 1484 (footnote omitted) (emphasis added).

In *Bauer* v. *Sampson*, 261 F.3d 775 (9th Cir. 2001), two members of today's majority emphasized the importance of the public character of speech in deciding whether it constitutes a "true threat." *Bauer* involved a college professor who published an underground campus newsletter containing threatening criticism of the college's board of trustees.[14] Noting that "[e]xpression involving a matter of public concern enjoys robust First Amendment protection," the opinion states that "although [the] writings have some violent content," the fact that they were made "in an underground campus newspaper in the broader context of especially contentious campus politics" rendered them a "hyperbole" and not a "true threat." *Id.* at 783-84.[15] The majority seems perfectly willing to have

[14]These writings included a reference to a "two-ton slate of polished granite" that defendant "hope[d to] drop" on the college president; a comment that "no decent person could resist the urge to go postal" at a meeting of the board; a fantasy description of a funeral for one of the trustees; and creating "a satisfying acronym: MAIM" from the college president's name. *Bauer*, 261 F.3d at 780.

[15]In fact, *no* prior case in our circuit has ever found statements charged with political content and delivered in a public arena to be true threats. See, in addition to the cases already cited, *Lovell* v. *Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996) (finding a "true threat" where a student directly threatened to kill the school counselor in her own office); *United States* v. *Gordon*, 974 F.2d 1110 (9th Cir. 1992) (imposing liability where defendant entered former President Reagan's house and, when apprehended, repeatedly asserted his wish to kill the President); *United States* v. *Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990) (holding that defendant's statements to an INS agent, delivered face-to-face and by phone, that the agent "will pay" for defendant's arrest, were "true threats"); *United States* v. *Gilbert*, 884 F.2d 454 (9th Cir. 1989) (finding a true "threat" where a white supremacist mailed a threatening letter and several posters directly to the founder of an adoption agency that placed minority children with white families); *United States* v. *Mitchell*, 812 F.2d 1250 (9th Cir. 1987) (finding a "true threat" where defendant, when questioned by customs officials and Secret Service agents in isolation, repeatedly

this court treat expressly violent statements by Charles Evers and Roy Bauer as hyperbole, but to hold the entirely *non*-violent statements by defendants to be true threats.

Finally, a word about the remedy. The majority affirms a crushing liability verdict, including the award of punitive damages, in addition to the injunction.[16] An injunction against political speech is bad enough, but the liability verdict will have a far more chilling effect. Defendants will be destroyed financially by a huge debt that is almost certainly not dischargeable in bankruptcy; it will haunt them for the rest of their lives and prevent them from ever again becoming financially self-sufficient. The Supreme Court long ago recognized that the fear of financial ruin can have a seriously chilling effect on all manner of speech, and will surely cause other speakers to hesitate, lest they find themselves at the mercy of a local jury. *See N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 277-79 (1964). The lesson of what a local jury has done to defendants here will not be lost on others who would engage in heated political rhetoric in a wide variety of causes.

In that regard, a retrospective liability verdict is far more damaging than an injunction; the latter at least gives notice of what is prohibited and what is not. The fear of liability for damages, and especially punitive damages, puts the speaker at

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threatened to kill President Reagan); *United States* v. *Merrill*, 746 F.2d 458, 460 (9th Cir. 1984) (finding a "true threat" where defendant mailed to several individuals "letters [with] macabre and bloody depictions of President Reagan along with the words 'Kill Reagan' "); *Roy* v. *United States*, 416 F.2d 874, 876 & n.6 (9th Cir. 1969) (finding that a statement by a marine to the telephone operator that he is "going to get" arriving President Johnson constitutes a threat, but suggesting that its decision could have been different if the "words were stated in a political . . . context").

[16]Although the majority remands the award of punitive damages, such award is affirmed unless grossly disproportionate. *See In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir. 2001).

risk as to what a jury might later decide is a true threat, and how vindictive it might feel towards the speaker and his cause. In this case, defendants said nothing remotely threatening, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties. In such circumstances, it is especially important for an appellate court to perform its constitutional function of reviewing the record to ensure that the speech in question clearly falls into one of the narrow categories that is unprotected by the First Amendment. The majority fails to do this.

While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court—the broad and uncritical deference to the judgment of a jury—will haunt dissidents of all political stripes for many years to come. Because this is contrary to the principles of the First Amendment as explicated by the Supreme Court in *Claiborne Hardware* and its long-standing jurisprudence stemming from *Brandenburg* v. *Ohio*, I respectfully dissent.

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